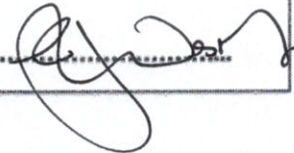


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 15315/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
26/03/2019	
	

In the matter between:

PUBLIC INVESTMENT CORPORATION SOC *et al*

Applicants

and

COMPANIES & INTELLECTUAL PROPERTY
COMMISSION *et al*

Respondents

JUDGMENT

VAN DER WESTHUIZEN, J

- [1] This application came before me as a matter of urgency. It concerns the issue by the respondent, the Companies & Intellectual Property Commission (CIPC), of a compliance notice in terms of the provisions

of section 171 of the Companies Act, 71 of 2008 (the Act), to the applicant, the Public Investment Corporation SOC (PIC), or its board, on 21 February 2019. The notice stipulated compliance therewith to be before or on 15 March 2019.

- [2] The issue is whether the issued compliance notice is defective and stands to be set aside, or whether it ought to be suspended pending a review of that notice in the normal course.
- [3] In terms of section 171(5) of the Act, an issued notice of compliance remains in force until set aside, either by the Companies Tribunal, or a Court. Hence this application.
- [4] Much of what PIC contends is common cause, or not seriously disputed by CIPC. However, CIPC has launched a counterapplication for the modification of the notice in certain respects.
- [5] The notice requires PIC, and not its board to whom the notice is directed, to recover R4,3 billion from Ayo Technology Proprietary Limited (Ayo) to whom it was paid during December 2017 for a subscription of shares. As recorder earlier, PIC is obliged to recover the aforesaid amount within 15 business days from the issue of the notice. The interest on the said amount is to be recovered within six months of the date of the issued notice.
- [6] In my view the matter is urgent and I heard the application and reserved judgment. A second urgent application was issued in respect of the said notice and was enrolled to be heard when this application was heard. The applicant in that application is Ayo Technology Solutions (Pty) Ltd, the party to whom the payment of the said amount was made. The respondent parties are *inter alia* PIC and CIPC. I shall deal with that application in a separate judgment.

[7] Several grounds are raised upon which PIC relies for the review and setting aside of the said notice, or alternatively the suspension thereof pending a review in the normal course. These are:

(a) Absence of a fair procedure;

(b) Irrational decision taken by CIPC;

(c) Material factual error.

[8] Under the rubric, Absence of a fair procedure, PIC submits that a fair procedure includes a fair hearing prior to the taking of a decision.¹ In the absence of a fair hearing, or as in the present instance no hearing, the decision taken is reviewable under both PAJA and the principle of legality.² It is further submitted on behalf of PIC that where a proper hearing is not afforded, it constitutes a nullity.³

[9] It is common cause between the parties that no advance notice was afforded PIC of the taking of, or the possibility of, the decision to issue a notice in terms of section 171 of the Act. When representatives of PIC met with representatives of CIPC on 20 February 2019, they were unaware of the detail to be discussed at that meeting. Furthermore, they were aware that no notice was given to the board of PIC against whom the issued notice was directed. This is common cause between the parties. It is further common cause that the decision to issue the compliance notice had already been taken prior to the meeting of 20 February 2019. It was in fact issued the day after the meeting. It is also common cause that nothing that could be said by PIC at the said meeting would impact upon the decision to issue the notice. CIPC does not dispute that it was informed at the meeting that the board of PIC had not taken the decision to subscribe to the shares and that

¹ *Joseph et al v City of Johannesburg* 2010(4) SA 55 (CC) at [42]

² *Minister of Home Affairs et al v Scalabrini Centre et al* 2013(6) SA 421 (SCA) at [67] – [69]

³ *Crook et al v Minister of Home Affairs et al* 2000(2) SA 385 (T) at 398I-J

steps were taken to recover the said amount of R4,3 billion from Ayo. It is common cause that the aforementioned information had no effect upon the decision taken prior to 20 February 2019 and that despite the information supplied, the said notice was nevertheless issued on 21 February 2019.⁴

- [10] It is common cause that no fair hearing had been afforded PIC in respect of the possibility of the issuing of the notice of compliance. In this regard, the provisions of sections 168 to 171 of the Act prescribe the parameters within which the power to issue a compliance notice is to be exercised. In oral argument, it was conceded on behalf of CIPC that it was obliged to afford PIC a fair hearing prior to the taking of the decision to issue a compliance notice.⁵ That concession is well made.
- [11] However, it is submitted on behalf to CIPC that PIC has acquiesced in the issuing of the said notice and merely sought an extension of the period within which to comply therewith. In this regard CIPC relies on correspondence to that effect and seeks in its counterapplication that the notice be modified in terms of the provisions of section 172(2) of the Act. The modifications that are sought relate to the actions to be taken and the period within which those actions are to be taken by PIC.
- [12] That submission cannot be upheld. Section 172(2) of the Act provides that any person issued with a compliance notice in terms of the Act may apply for the review thereof and the compliance notice may be confirmed or modified or set aside. In the instance of confirmation or modification of the notice, that section presupposes that a valid decision was taken and a valid notice of compliance was issued. Furthermore, the relevant correspondence makes it clear that the taking of the decision to issue the notice and the issuing thereof, lacks legality as required by the Constitution and is hence reviewable. At no stage did PIC acquiesce in the taking of the decision and the issuing of

⁴ *Administrator, Transvaal et al v Zenzile et al* 1991(1) SA 21 (SCA) at 37C-F

⁵ *Zondi v MEC for Traditional and Local Government Affairs* 2005(3) SA 589 (CC) at [101]


the said notice. That much is gleaned from the correspondence relied upon by CIPC.

- [13] In my view, it follows that the issued notice of compliance is a nullity and stands to be set aside.⁶
- [14] In view of my finding that the issued notice of compliance is a nullity, it does not require consideration of the other grounds upon which the issued notice is attacked.
- [15] It follows further that the counterapplication cannot succeed and stands to be dismissed. No valid notice was issued that could be modified.

I grant the following order:

- (a) The Compliance Notice issued by the respondents on 21 February 2019 to the applicants is declared unlawful and of no force or effect;
- (b) The Compliance Notice mentioned in paragraph (a) above is set aside;
- (c) The respondents are, jointly and severally, the one paying the other to be absolved, to pay the applicants' costs, such costs to include the costs consequent upon the employ of two counsel;
- (d) The counterapplication is dismissed;
- (e) In respect of the costs of the counterapplication, the respondents are jointly and severally, the one paying the other to be absolved, to pay the applicants' costs, such costs to include the costs consequent upon the employ of two counsel.

⁶ *Gavric v Refugee Status Determination Officer et al* 2019(1) SA 21 (CC) at [79] – [80]



C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: G Marcus SC
P Ngcongo
D Wild
Instructed by: Gwina Attorneys Inc.

On behalf of Respondent: A F Arnoldi SC
S Mentz
Instructed by: State Attorney